

DEPARTMENT OF FISH AND GAME

1416 Ninth Street
Sacramento, California 94244-2090
Telephone: (916) 654-3821



November 17, 2000

Mr. Harry M. Schueller, Chief
Division of Water Rights
State Water Resources Control Board
P. O. Box 2000
Sacramento, California 95812-2000

RE: COMMENTS OF THE DEPARTMENT OF FISH AND GAME - IMPROVING THE
WATER RIGHT PROCESS AND PROCEDURES PUBLIC WORKSHOP

Dear Mr. Schueller:

The California Department of Fish and Game (CDFG) has received a Notice of Public Meeting to receive comments and recommendations regarding actions that could be taken to improve the SWRCB water right process. The enclosed comments are not a comprehensive evaluation by CDFG, but represent some comments to hopefully improve CDFG's participation in the SWRCB water right process.

Hearings

Often, there is a short amount of time between the time CDFG receives notice of an upcoming hearing and the date that a Notice of Intent to Appear and the corresponding testimony is due. For example, CDFG received notice of the upcoming hearing regarding a change petition filed by the Victor Valley Water Reuse Authority (VWVRA) on October 13, 2000. The Notice of Intent to Appear was due only one week later, on or before October 20, 2000, and the original notice stated that testimony was due November 6, 2000.

The short time deadlines in the VWVRA Notice is typical of CDFG's experience with SWRCB hearings in general. These short deadlines create a hardship for CDFG to hire any necessary expert witnesses and fully develop CDFG's testimony. In discussing the matter with staff at the United States Fish and Wildlife Service (USFWS), the USFWS expressed a desire to participate in the hearing, but did not meet the extremely short time line set forth in the VWVRA Notice. Having such short deadlines not only limits the number of parties who typically appear before the SWRCB (the USFWS and National Marine Fisheries Service (NMFS) generally do not receive a direct copy of such notices) but also limits the depth of the testimony that is submitted, due to the short time in which to develop it.

Mr. Harry M. Schueller
November 17, 2000
Page 2

A crucial element of meeting these short deadlines and CDFG appearing at a SWRCB hearing is receiving actual notice of the hearing. On occasion, CDFG has not participated in hearings before the SWRCB because the notice did not go to the proper persons at CDFG. CDFG requests that notice of upcoming hearings be sent to both the appropriate regional office and to the CDFG headquarters office in Sacramento. Specifically, CDFG requests that the SWRCB send the regional office notice to the address listed on the map attached to this letter as Attachment 1 and addressed to the Regional Manager. CDFG requests that the SWRCB send two notices to headquarters addressed to:

Mr. Larry Week, Chief
Native Anadromous Fish and Watershed Branch
California Department of Fish and Game
1416 Ninth Street, 12th Floor
Sacramento, California 95814

Ms. Nancee Murray, Staff Counsel
California Department of Fish and Game
Legal Office
1416 Ninth Street, 12th Floor
Sacramento, California 95814

Enforcement

CDFG believes that there are many unlicensed and unregulated wells located next to streams in California negatively impacting public trust resources. CDFG has filed complaints regarding some of those wells, for example, regarding a well on Laguna Creek in Santa Cruz County. The current SWRCB process unfairly burdens CDFG and the public trying to protect public trust resources impacted by these unlicensed and probably illegal diversions. Diverters, knowing this loophole and the fact that surface diversions will probably be burdened with conditions sufficient to protect public trust resources, are increasingly turning to wells near a stream rather than utilizing either existing surface diversion rights or applying for those rights. On Laguna Creek, for example, the diverter in question has not utilized their surface diversion right in several years, instead relying on the condition-free use of their well, located approximately 40-50 feet from Laguna Creek.

The current SWRCB process allows any landowner to sink a well right next to a stream and begin pumping water. That well could be inches from the stream. The burden of proof is on CDFG, or the public, to prove that this well is pumping the underflow of the stream. The SWRCB will dismiss any complaint that is not accompanied by sufficient proof of the alleged violation. CDFG, or the public, must then go to the great expense of hiring a geologist to

Mr. Harry M. Schueller
November 17, 2000
Page 3

investigate the hydrogeologic setting of the well and the stream. Meanwhile, the diverter earns a profit from the illegal diversion from the stream and public trust resources such as coho salmon and steelhead, denied use of the water sucked out of the stream by the well, suffer. On Laguna Creek, CDFG did go to that expense to prove the existence of a subterranean stream and request SWRCB action to stop the illegal diversion. See letter to Cori Condon, Division of Water Rights, dated May 10, 2000 and attached as Attachment 2. And still, the steelhead continue to wait and suffer.

The current SWRCB process could be improved by the SWRCB shifting the burden of proof to the well owner after the complainant has demonstrated the possibility of a well diverting from the underflow of a stream. Alternatively, the burden of proof could shift to the well owner after the complainant demonstrates that the stream near the well has habitat important to public trust resources. Shifting the burden of proof early on makes sense, as the well owner, and not the complainant, has access to the well site and the ability to do a pump test to definitively determine whether or not the well is drawing from the underflow of the stream.

In addition, the current SWRCB standard for determining whether or not a subterranean stream exists involves a requirement to determine the "bed and banks" of the subterranean stream. This is most likely the result of an interpretation of a legal requirement and is not based on good science or protection of public trust resources. The standard for determining whether a subterranean stream exists and if a well is drawing from that subterranean stream should not require finding bed and banks of that subterranean stream, but should instead be predicated on whether or not the well influences the surface flow of the stream. After all, what CDFG and presumably the SWRCB is trying to prevent is an illegal diversion of the surface flow. Illegal diversions impact not only fish and wildlife resources, but also downstream water right holders. Therefore, the SWRCB should change the standard for determining the existence of a subterranean stream either by regulation or legislation to reflect that merely a showing of an influence between the well and the stream makes the well jurisdictional for the SWRCB.

Thank you for this opportunity to comment. We look forward to working with you in the future to improve the water right process and procedures.

Sincerely,

ORIGINAL SIGNED BY

Ronald D. Rempel
Deputy Director

Attachments

cc: See next page.

Mr. Harry M. Schueller
November 17, 2000
Page 4

cc: Department of Fish and Game

Mr. Larry Week, Chief
Native Anadromous Fish and Watershed Branch

Ms. Nancee Murray, Senior Staff Counsel
Office of the General Counsel

Mr. Don Koch, Regional Manager
Northern California and North Coast Region

Mr. Banky Curtis, Regional Manager
Sacramento Valley and Central Sierra Region

Mr. Robert Floerke, Regional Manager
Central Coast Region

Mr. William Loudermilk, Regional Manager
San Joaquin Valley and Southern Sierra Region

Mr. C. F. Raysbrook, Regional Manager
South Coast Region

Mr. Curt Taucher, Regional Manager
Eastern Sierra and Inland Deserts Region

Ms. Patty Wolf, Regional Manager
Marine Region